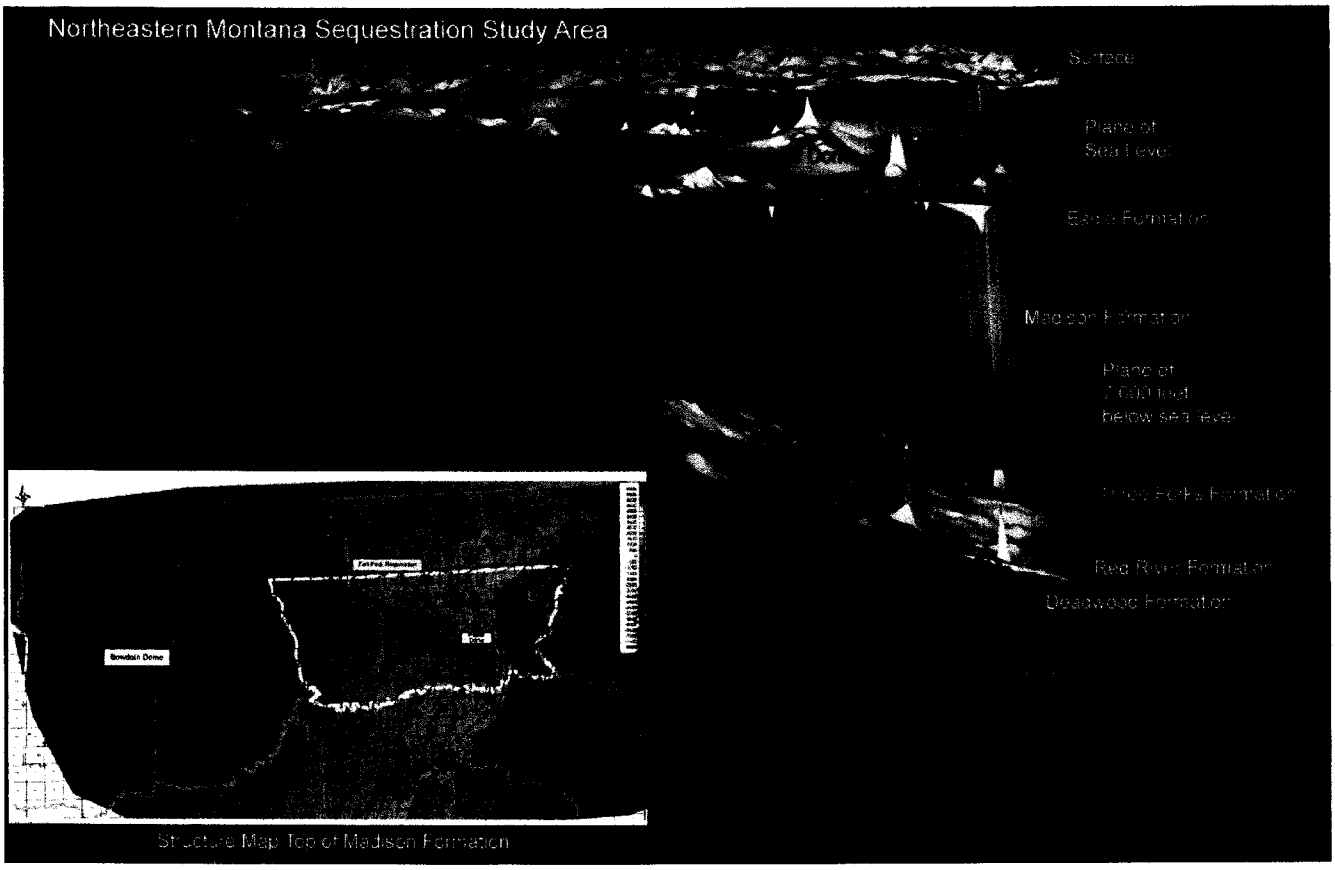
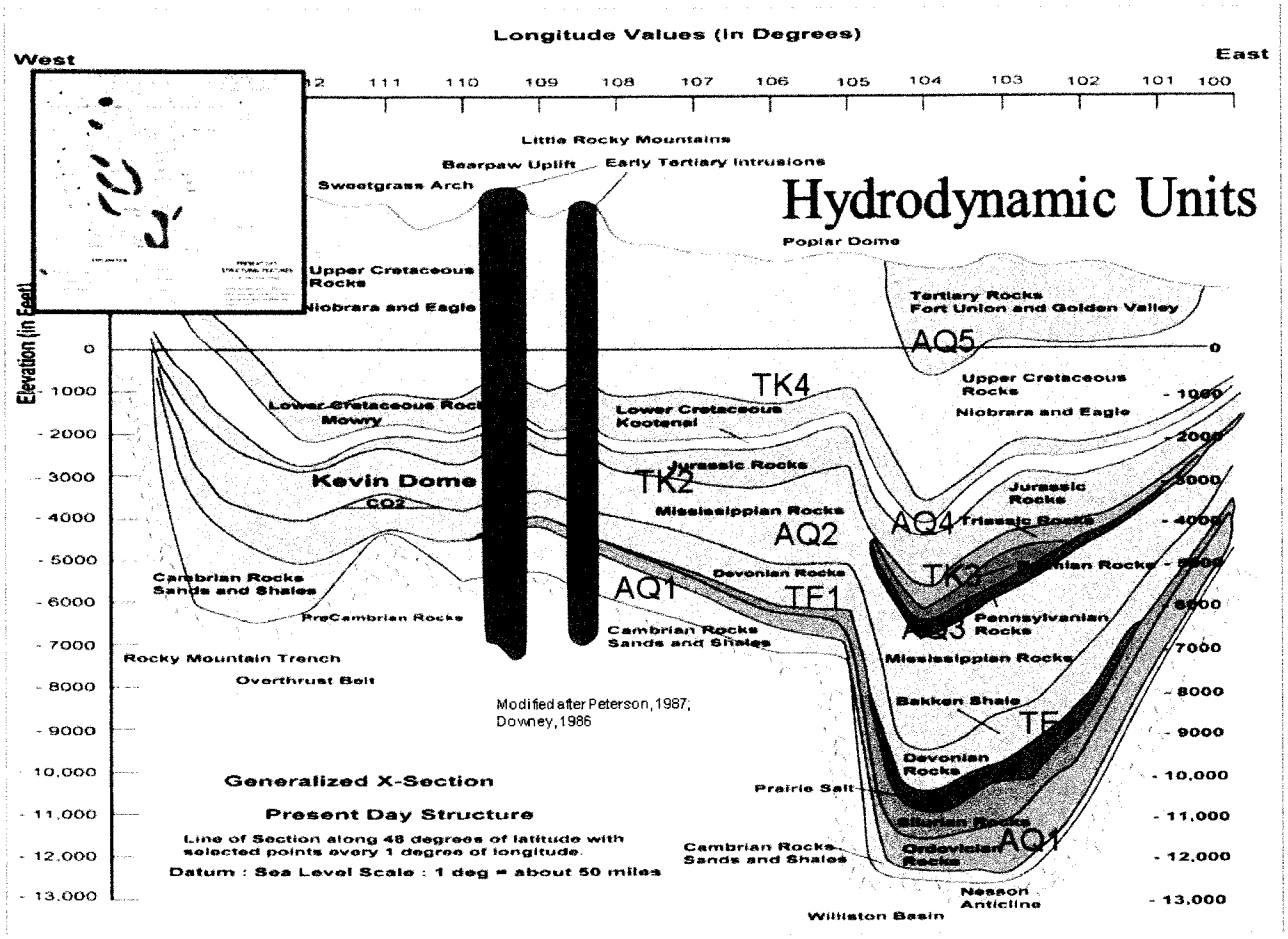
EXHIBIT 9
DATE 2/18/09
HB 502





Generalized cross-section, present day structure.

February 17, 2009

MEMORANDUM

TO: Mike Volesky, Governor's Natural Resource Policy Advisor
FR: Tommy Butler, Trust Lands Attorney, DNRC
RE: Legislative declaration of State ownership of geologic "pore space" in HB 502

A review of Montana law reveals that ownership of "pore space" for the storage of carbon dioxide in geologic strata is an unresolved legal question. There is no case law on the ownership of such space for lands possessing a severed mineral estate. Where such legal uncertainty exists, the legislature has previously sought to resolve similar property title questions; most recently in 1993 when the Montana legislature clarified the ownership of coal bed methane by enacting the legal definitions of "coal" and "gas" in Section 82-1-111, MCA. This previous legislation helped promote the development of coal-bed methane by clarifying the title to that gas.

HB 502 declares that the State of Montana is the ownership of "pore space" within all lands, except federal or tribal lands. This legislative declaration of State ownership of this resource is based upon the theory of the public trust doctrine - the legal principle that certain resources are preserved for public use and that government must maintain it for the public good. See, Sax, Joseph L, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention", 68 Michigan Law Review 471 (1970).

Several state courts have held that the public trust doctrine exists independently of any statutory declarations. *See, e.g.,* National Audubon Soc'y v. Superior Ct. Of Alpine Cty., 33 Cal.3d 419, 189 Cal.Rptr. 346, 658 P.2d 709, 728 n. 27 (1983.) ("Aside from the possibility that statutory protections can be repealed, the noncodified public trust doctrine remains important both to confirm the state's sovereign supervision and to require consideration of public trust uses in cases filed directly in the courts ...."), *cert. denied,* 464 U.S. 977, 104 S.Ct. 413, 78 L.Ed.2d 351 (1983); Kootenai Envtl. Alliance v. Panhandle Yacht Club, Inc., 105 Idaho 622, 671 P.2d 1085, 1095 (1983) ("[M]ere compliance by [agencies] with their legislative authority is not sufficient to determine if their actions comport with the requirements of the public trust doctrine. The public trust doctrine at all times forms the outer boundaries of permissible government action with respect to public trust resources."). San Carlos Apache Tribe v. Superior Court ex rel. Maricopa County, 193 Ariz. 195, 972 P.2d 179, 199 (1999)("The public trust doctrine is a constitutional limitation on legislative power.... The Legislature cannot order the courts to make the doctrine inapplicable to these or any proceedings.").

Consequently, the public trust doctrine has been applied to a variety of natural resources, including:

Stream Access

The doctrine has been applied in the context of stream access. In the legal cases applying the doctrine to stream access, it appears that the Montana Supreme Court

recognized that the doctrine did not take precedence over the prior appropriataion doctrine and water rights. See Galt v. State by and through Dept. of Fish, Wildlife and parks, (1987), 225 Mont. 142, 731 P.2d 912; Montana Coalition for Stream Access, Inc. v. Hildreth (1984) 211 Mont. 29, 684 P.2d 163;

Navigable Waters

Illinois Central R.R. Co. v. Illinois, 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018 (1892); Weden v. San Juan County, 958 P.2d 273, 284 (Wash., 1998) (doctrine regulates personal watercraft on state waters); Vander Bloemen v. Wisc. Dep't of Nat. Res., No. 95-1761,1996 WL 346266 (Wis. Ct. App. 1996) (doctrine protects lakeside ecology);

Fish

People v. Truckee Lumber Co., 116 Cal. at pp. 400-401, 48 P. 374 ("The dominion of the state for the purposes of protecting its sovereign rights in the fish within its waters, and their preservation for the common enjoyment of its citizens, is not confined within the narrow limits suggested by defendant's argument. It is not restricted to their protection only when found within what may in strictness be held to be navigable or otherwise public waters."); Selkirk-Priest Basin Ass'n, Inc. v. Idaho ex rel. Andrus, 899 P.2d 949 (Idaho, 1995) (doctrine allows challenge to land management action where that sedimentation could injure fish spawning grounds); Pullen v. Ulmer, 923 P.2d 54 (Alaska, 1996) (doctrine covers fish in their natural state);

Wildlife

Geer v. Connecticut, 161 U.S. 519, 527, 529, 16 S.Ct. 600, 40 L.Ed. 793 (1896); overruled in *Hughes v. Oklahoma* (1979) 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250.), wherein the Court held that:

> Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the State, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government, as distinct from the people, or for the benefit of private individuals as distinguished from the public good. Therefore, for the purpose of exercising this power, the State ... represents its people, and the ownership is that of the people in their united sovereignty.

Geer v. Connecticut, *supra,* 161 U.S. at p. 529, 16 S.Ct. 600;

Public Parks

Friends of Van Cortland Park v. City of New York, 750 N.Y.2d 1050 (N.Y. 2001) (doctrine covers public parks);

Groundwater

In re Water Use Permit Applications, 9 P.3d 409 (Haw., 2000) (doctrine covers groundwater); and

Aquifers or geologic strata

Several Courts have previously recognized public storage rights in geologic strata. In Board of County Commissioners of County of Park v. Park County Sportsmen's Ranch, 45 P.3d 693 (Colo., 2002), private land owners brought a declaratory judgment action seeking a determination that a rancher had no right to artificially recharge and store water in aquifers underlying their private land without the landowners' permission. Id. at 700, 703. The Colorado Supreme Court held that the rancher had no obligation to seek the landowners' permission or to pay just compensation because a recharge of an aquifer does not constitute a trespass. Id. at 706-07. See also, Chance v. BP Chems., Inc., 77 Ohio St.3d 17, 670 N.E.2d 985, 992-94 (1996) (rejecting a trespass claim based upon absolute ownership of water and migration of liquid injected into the aquifer.); South West Sand & Gravel, Inc. v. Central Arizona Water Conservation Dist., 2008 WL 4837693, 4 (Ariz.App. Div. 1) (Ariz.App. Div. 1,2008)

The public trust doctrine has been evolved beyond its traditional common law emphasis on commerce, navigation, and fisheries, and has been recognized as "sufficiently flexible to encompass changing public needs" [Marks v. Whitney, 6 Cal.3d 251 at 259, 491 P.2d 374 at 380, 98 Cal.Rptr. 790 at 796 (Cal., 1971)] such as concern for the environment, expanding recreational uses, and aesthetic preservation. National Audubon Society v. Superior Court, 33 Cal.3d 419, 434-435, 189 Cal.Rptr. 346, 658 P.2d 709 (Cal., 1983); City of Berkeley v. Superior Court, 26 Cal.3d 515, 521, 162 Cal.Rptr. 327, 606 P.2d 362 (Cal., 1980)

Some may question whether the State possesses the clear authority to declare public trust ownership of geologic pore space by citing Section 70-16-101, MCA. This statute reflects the old common law view that a private land owner owns all the rights in its property above and below it. (The latin phrase is Cuius est solum, eius est usque ad coelum et ad inferos".) Translated as: "For whoever owns the soil, it is theirs up to the sky and down to the depths". The U.S. Supreme Court has been critical of this historic principle of property law, stating in United States v. Causby, 328 U.S. 256 (1946) that this ancient common law doctrine had no legal effect "in the modern world." A property right is nothing more than the right to exclusive use of property and the right to exclude others.

In U.S. v. Causby, a property owner sought damages from the United States for trespassing across his "air-space". Military aircraft from a local airbase were frightening his chickens. Fly-bys from the local airbase caused his chickens to fly into walls and die. Causby wanted to enforce his right to what he thought was his exclusively-owned airspace above his property. Although, the U.S. Supreme Court recognized a constitutional taking of Causby's property rights, it did so because the Air Force conceded on oral argument that if the flights rendered the property uninhabitable, a taking would have occurred. However, Justice Douglas, in writing this opinion for the Court held that:

> It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe-Cujus est solum ejus est usque ad coelum. But that doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim.

U.S. v. Causby, 328 U.S. 256, 260-261, 66 S.Ct. 1062, 1065 (U.S. 1946)

There are two important points derived from U.S. v. Causeby: 1) the U.S. Supreme Court has recognized that property rights are not absolute (Instead, private property rights are qualified by the extent of public rights.); and 2) Congress could validly declare airspace as a public resource.

Most western states recognize a common public right to transport irrigation water in natural water courses - because it is a common public right maintained by the State. This bill would recognize a similar common public right for the storage of Carbon Dioxide in empty geologic strata. A land owner's title to property is subject to pre-existing limitations arising from the state's reservation of public resources. Landowners whose properties border a natural watercourse or lie over an aquifer cannot maintain an action for trespass or a taking arising out of public use of public resources. If several Courts have recognized that the storage of water under private land does not constitute a taking, it is likely that the storage of Carbon Dioxide does not constitute a taking either.

Because of the absence of Montana case law on this subject, it is entirely possible that the legal rationale that I have set out in this memorandum in support of HB 502 may prove to be incorrect. See, Bell v. Town of Wells, 557A.2d168, 179 (Me.,1989) (A state, under the guise of interpreting its common law, cannot sanction a physical invasion of the property of another.) However, where legal uncertainty exists, the responsibility ultimately falls to the legislature and to our courts to clarify those legal rights and relationships. HB 502 will initiate the process to determine the ownership of "pore space" in geologic formations in Montana. The Legislature clearly has the authority to codify the common law, and declare the nature and extent of its public trust properties. See, Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 475 (1988)